

No. SC85585

IN THE
SUPREME COURT OF MISSOURI

THELMA SCHEMBRE, et al.,

Appellant,

v.

JEFFERSON MEMORIAL HOSPITAL, et al.,

Respondent.

On Appeal from the Circuit Court of the County of Jefferson, State of
Missouri
Honorable Gary P. Kramer

STATEMENT, BRIEF AND ARGUMENT OF *AMICUS CURIAE*
THE MISSOURI HOSPITAL ASSOCIATION IN SUPPORT OF
RESPONDENTS JEFFERSON MEMORIAL HOSPITAL AND
CHRISTOPHER GUELBERT, RN

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JURISDICTIONAL STATEMENT

This appeal is from an order granting summary judgment in favor of Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN entered on July 5, 2002, in the Circuit Court of Jefferson County, Missouri. The appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction was originally vested in the Missouri Court of Appeals, Eastern District pursuant to Article V, § 3 of the Missouri Constitution (as amended 1982). However, this appeal is properly before this Court because of this Court's October 28, 2003, order of transfer pursuant to Missouri Supreme Court Rule 83.04.

STATEMENT OF FACTS

The *amicus curiae* adopts the statement of facts from the Substitute Brief filed by Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN.

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN GRANTING THE MOTION FOR SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS JEFFERSON MEMORIAL HOSPITAL AND CHRISTOPHER GUELBERT, RN, BECAUSE RESPONDENTS WERE ENTITLED TO STATUTORY IMMUNITY UNDER §194.270.3, RSMO IN THAT APPELLANT HAS FAILED TO ALLEGE A MATERIAL FACT IN DISPUTE THAT WOULD SHOW AS A MATTER OF LAW THAT RESPONDENTS WERE NEGLIGENT OR ACTED IN BAD FAITH IN CONFORMING WITH THE MISSOURI UNIFORM ANATOMICAL GIFT ACT.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,

854 S.W.2d 371 (Mo. banc 1993)

Hornmeyer v. City of Springfield, 98 S.W.3d.637 (Mo.App., S.D. 2003)

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(Mo.App., W.D. 1995)

§ 194.270.3, RSMo

§ 194.220.2, RSMo

§ 194.223, RSMo

§ 194.240.5, RSMo

Christopher S. “Kit” Bond, Editorial: *Congress needs to restore provisions supporting care in the home*, THE ST. LOUIS POST DISPATCH, September 28, 1999; and
Laurie McGinley, *Hospitals Feel Sting of Cuts From Insurers*, WALL ST. J., Mar. 16, 2000.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING THE MOTION FOR SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS JEFFERSON MEMORIAL HOSPITAL AND CHRISTOPHER GUELBERT, RN, BECAUSE RESPONDENTS WERE ENTITLED TO STATUTORY IMMUNITY UNDER §194.270.3, RSMO IN THAT APPELLANT HAS FAILED TO ALLEGE A MATERIAL FACT IN DISPUTE THAT WOULD SHOW AS A MATTER OF LAW THAT RESPONDENTS WERE NEGLIGENT OR ACTED IN BAD FAITH IN CONFORMING WITH THE MISSOURI UNIFORM ANATOMICAL GIFT ACT.

In the present case, the Appellants assert that the trial court erred in granting summary judgment in favor of Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN.

When reviewing an order granting a summary judgment, this Court must review the record in the light most favorable to the party against whom the judgment was entered. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

The issue with respect to the summary judgment in the present case is whether the trial court properly determined as a matter of law that Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN were entitled to immunity under §194.270.3 of Missouri's Uniform Anatomical Gift Act (UAGA).

Under §194.270.3, RSMo a person is entitled to immunity if he or she “acts without negligence and in good faith in accord with the terms of [Missouri’s UAGA] or with the anatomical gift laws of another state or a foreign country.” Thus, this Court must determine whether there was a dispute concerning a material fact that would show, as a matter of law, that Respondents acted negligently or in bad faith with respect to compliance with Missouri’s UAGA.

The key to whether Appellants have alleged disputed facts that would show negligence or bad faith is in the statutes that constitute the UAGA. Section 194.220.2, RSMo lists the individuals who may consent to an anatomical gift on behalf of a deceased. Section 194.223, RSMo requires a hospital to designate one or more individuals to request consent for anatomical gifts. Section 194.240.5 requires that consent to be in writing.

In order to show negligence, a claimant must establish that there was a duty, that the defendant breached that duty and that the breach proximately caused injury to the claimant. *Hornmeyer v. City of Springfield*, 98 S.W.3d 637, 641 (Mo.App., S.D. 2003). Good faith is "an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage." *Nicoletta v. Rochester Eye and Human Parts Bank, Inc.*, 519 N.Y.S.2d 928, 930 (N.Y. App. Div. 1987).

In the present case, appellant has alleged no facts to show either negligence or bad faith in the Respondents’ compliance with the UAGA. The UAGA requires written consent. The Respondents obtained written consent. The UAGA does not

require “informed consent,” which generally requires disclosure of risks of various medical procedures and a discussion of possible alternative treatments or procedures. See *Wilkerson v. Mid-America Cardiology*, 908 S.W.2d 691, 696-698 (Mo.App., W.D. 1995). Indeed, the concept of informed consent in this context is counterintuitive. There is no need to disclose possible risks to the patient or alternative treatments because the patient is already dead. No facts have been alleged that would show that Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN, were negligent in obtaining written consent or had a malicious or fraudulent motive in obtaining that consent. For that reason, this Court should affirm the trial court’s order granting summary judgment in favor of Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN.

Public policy also supports the trial court’s order. If the trial court had allowed appellant to make what is effectively a claim of lack of informed consent, it would open the door to a new set of possible claims not previously recognized under the UAGA. It would make the process for hospitals to obtain organ donations more complex and the possibility of the hospitals’ liability less predictable. As a result, hospitals may reduce their requests for organ donations. Such a result would be contrary to the policy behind the UAGA, which is to encourage organ donations. Another possibility is that hospitals may attempt to offset the costs of the potential liability involved in organ donation by increasing their charges, further reducing the availability of affordable health care.

Hospitals are dealing with a financial slump caused by the reduction in the amount of reimbursement for treatment of Medicare patients mandated by the Balanced Budget Act of 1997. In fact, budget cuts have had such an impact that several of MHA-member hospitals in Missouri have been forced to close since July 1999.

The financial impact of the budget cuts is more severe than intended and has resulted in an attempt to legislatively correct the problem. United States Senator Christopher S. “Kit” Bond supported such legislation, noting in an editorial that cuts in Medicare reimbursement have reduced access to home health care due to thousands of home health care providers that have closed as a result of the budget cuts. Christopher S. “Kit” Bond, Editorial: *Congress needs to restore provisions supporting care in the home*, THE ST. LOUIS POST DISPATCH, September 28, 1999. Since then, Congress passed the Balanced Budget Refinement Act of 1999, which restored the budget cuts by more than \$16 billion over a period of five years, \$7 billion of which was earmarked for hospitals. See Laurie McGinley, *Hospitals Feel Sting of Cuts From Insurers*, WALL ST. J., Mar. 16, 2000, at B2.

The added funds from the Balanced Budget Refinement Act of 1999 unfortunately have not made much of an impact on hospitals, many of which have more than 50 percent of their revenue from patient care tied to Medicare payments. In addition to cuts in the amount of reimbursement hospitals obtain for their services, the relationship of hospitals with managed care organizations has

been a difficult one financially. Private insurers and managed care organizations have contributed as much or more to the problem than Medicare reimbursement cuts. *See id.* Not only are hospitals receiving less reimbursement from these organizations than from traditional health insurance companies, they often are not getting paid in a timely manner.

The continued reduction in access to hospitals, particularly in the more rural areas of Missouri is a significant concern. In fact, it probably is of greater concern than an increase in the cost of health care. The financial reality is that when hospitals increase the cost of health care, it does not have much impact, if any, on what they actually receive in return for their services. It ordinarily is written off as their contribution to the cost of managed care or is an amount they are unable to collect in the face of pre-set Medicare reimbursement rates that are often lower than what it costs hospitals to provide the service in the first place.

In summary, creating a new type of claim under the UAGA based on “informed consent” is not supported by public policy or the UAGA. The result would discourage organ donation requests or increase the cost and availability of health care. This places our health care system at risk and has the very real possibility of eliminating access to health care for many Missourians. Moreover, the Appellants have not alleged disputed facts that would show that Respondents were negligent or acted in bad faith in obtaining written consent for the anatomical gift in the present case.

CONCLUSION

In light of the above, the Missouri Hospital Association as *amicus curiae* in support of Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN, requests this Court affirm the trial court's order granting summary judgment in favor of Respondents.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 4th day of December 2003, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Special Rule No. 1, the foregoing document is printed in 13-point proportionally-spaced type (Times New Roman), was prepared with Microsoft Word XP 2002 software for Windows, and contains 2,015 words according to this software. In addition, I certify that the computer disk submitted with this document was scanned for viruses and that the disk is virus free.

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